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No. 06-26

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WELDON ANGELOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE 145 INDIVIDUALS, INCLUDING FORMER UNITED STATES ATTORNEYS GENERAL, RETIRED UNITED STATES CIRCUIT COURT JUDGES, RETIRED UNITED STATES DISTRICT JUDGES, FORMER UNITED STATES ATTORNEYS AND OTHER FORMER HIGH RANKING UNITED STATES DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Interest of Amici Curiae 1

Summary of Argument 1

Statement of the Facts 5

Argument 5

Mr. Angelos' 55-year Mandatory Sentence Violates Society's Evolving Standards of Decency. 5

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Atkins v. Virginia
536 U.S. 304 (2002) 5, 7, 10

Coker v. Georgia
433 U.S. 584 (1977) 10

Dickerson v. United States
530 U.S. 428 (2000) 3

Estelle v. Gamble
429 U.S. 97 (1976) 6

Gregg v. Georgia
428 U.S. 153 (1976) 10

Harmelin v. Michigan
501 U.S. 957 (1991) 2, 5, 6, 7, 10

Hutto v. Davis
454 U.S. 370 (1982) ..... *passim*

Miranda v. Arizona
384 U.S. 436 (1966) 3

Roper v. Simmons
543 U.S. 551 (2005) 5, 6, 7

Rummel v. Estelle
445 U.S. 263 (1980) 10

Cited Authorities

Page

Trop v. Dulles
356 U.S. 86 (1958) 6

United States v. Booker
543 U.S. 220 (2005) 3

United States v. Wilson
350 F. Supp. 2d 910 (D. Utah),
adhered to on denial of reconsideration,
355 F. Supp. 2d 1269 (D. Utah 2005) 3

Weems v. United States
217 U.S. 349 (1910) 4, 5, 6

Federal Statutes:

18 U.S.C. § 924(c) 1, 2, 4, 11

21 U.S.C. § 841 7

Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 8

Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.) 8

Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Sta. 1248 (codified in scattered sections of 18 U.S.C.) 8

Cited Authorities

Page

Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A. and 42 U.S.C.A.) 8

State Statutes:

Va. Code § 18.2-10(e) (1975) 9

Va. Code § 18.2-248.1(a)(2) (Supp. 1981) 9

Other Authorities:

American Bar Association Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates, dated Aug. 2004 8

Marcus Tullius Cicero, *De Legibus* 5

Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case (H. Bedau & P. Cassell eds. 2004) 3

Justice Kennedy Feels His Oats, Nat'l L.J., July 17, 2006 8

Cited Authorities

Page

List of Pardons, Commutations, Reprieves and Other Forms of Clemency, January 15, 1982 to January 17, 1983 Reported to The Governor and the General Assembly of Virginia 9

Stephen J. Markman and Paul G. Cassell, *Protecting the Innocent, A Response to the Bedau-Radelet Study*, 41 STANFORD L. REV. 121 (1988) (reprinted in part in 136 Cong. Rec. S6648 (May 21, 1990)) 3

Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537 (2006) 8, 11

The Pentateuch and Haftorahs, Exodus (Dr. J.H. Hertz Ed., 1979) 5

Post-Booker Federal Judicial Sentencing Practices, Testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Mar. 16, 2006 (Washington, D.C.), available at http://www.utd.uscourts.gov/judges/cassell_final.pdf 3

United States District Court for the District of Utah, Judge Paul G. Cassell, http://www.utd.uscourts.gov/judges/cassell.html 3

INTEREST OF AMICI CURIAE [1]

Amici Curiae are a group of 145 individuals, including former United States Attorneys General, retired United States Circuit Court Judges, retired United States District Judges, former United States Attorneys and other former high ranking United States Department of Justice officials, who together have hundreds of years of expertise in federal criminal law and federal sentencing issues.[2] Based on that collective experience, and on what we view as a cruel, unjust and even irrational 55-year mandatory minimum prison sentence — which was the finding of the very court that imposed the sentence — Amici respectfully urge the Court to grant Petitioner's request for a writ of certiorari.

SUMMARY OF ARGUMENT

Weldon Angelos is a first-time offender who, at the age of 24, was convicted of sixteen counts after trial by jury, including three counts under Title 18 U.S.C. § 924(c).[3] Two of these three counts (counts two and four of the indictment) charged that Mr. Angelos on two occasions possessed a pistol during the sale of $350 worth of marijuana to a government informant. Pet. App. 34-35. The third count (count ten of the indictment) charged

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1. No counsel for a party authored this brief in whole or in part. No party has made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this amicus brief; their letters of consent have been submitted herewith, pursuant to Supreme Court Rule 37.2(a).

2. A list of the Amici Curiae is set forth in the Appendix hereto at App. 1.

3. In connection with "all offenses other than the § 924(c) counts," the District Court sentenced Mr. Angelos to one day of imprisonment. Pet. App. 95-96.

Mr. Angelos with possessing firearms which he owned in his residence and used for recreational activities. *Id.* at 90. Mr. Angelos was not convicted of using, threatening to use, or even displaying these firearms. For his mere possession of the firearms in the course of the sale of small amounts of marijuana, Mr. Angelos will essentially spend the rest of his life in prison.

Applying the analysis set forth in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the District Court (Paul G. Cassell, United States District Judge) concluded that the sentence of 55 years was "cruel, unjust, and even irrational" (Pet. App. 33, 102), and that it was grossly disproportionate to the punishment that would be imposed for far more serious and violent crimes — crimes such as aircraft hijacking, second degree murder, espionage, kidnapping, and aggravated assault. *Id.* Despite the fact that Judge Cassell concluded that under the *Harmelin* test "Mr. Angelos' sentence violates the Eighth Amendment" (Pet. App. 92-93), he reluctantly concluded that he was obligated to apply this Court's *per curiam* holding in *Hutto v. Davis*, 454 U.S. 370 (1982) and uphold the sentence: ". . . an additional 55-year sentence for Mr. Angelos under § 924(c) is unjust, disproportionate to his offense, demeaning to victims of actual criminal violence — but nonetheless constitutional." Pet. App. 97.

In a unique effort to find a remedy for what it called "one of those rare cases where the system has malfunctioned" (Pet. App. 97), the District Court called upon the President of the United States to commute Mr. Angelos' sentence to no more than 18 years in prison (Pet. App. 34), and upon Congress to modify § 924(c) so that its harsh provisions for 25-year multiple

sentences apply only to true recidivist drug offenders. Pet. App. 34, 102.[4]

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4. By way of background, Judge Cassell was appointed to the United States District Court for the District of Utah by President George W. Bush in 2002. Judge Cassell's profile and credentials are available at *http://www.utd.uscourts.gov/judges/cassell.html*. Judge Cassell clerked for then Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia and Chief Justice Warren Burger, before serving as an Associate Deputy Attorney General and an Assistant United States Attorney for the Eastern District of Virginia from 1984 to 1991. *Id.* Before his appointment to the District Court, Judge Cassell was a law professor at the University of Utah College of Law and one of the nation's leading proponents of the death penalty, *see, e.g.*, *Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case* (H. Bedau & P. Cassell eds. 2004); Stephen J. Markman and Paul G. Cassell, *Protecting the Innocent, A Response to the Bedau-Radelet Study*, 41 STANFORD L. REV. 121 (1988) (reprinted in part in 136 Cong. Rec. S6648 (May 21, 1990)). Judge Cassell was also one of the nation's leading academic critics of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See http://www.utd.uscourts.gov/judges/cassell.html*. In *Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000) (holding that *Miranda v. Arizona* announced constitutional rule, which Congress may not supersede legislatively, and which the Court, following the rule of *stare decisis*, declined to overrule), this Court invited then Professor Cassell to assist the Court's deliberations by arguing in support of the underlying judgment because no party in the case had argued in favor of 18 U.S.C. § 3501's constitutionality. Following this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), Judge Cassell promptly concluded that the district courts should largely adhere to the sentencing guidelines. *See United States v. Wilson*, 350 F. Supp. 2d 910 (D. Utah), *adhered to on denial of reconsideration*, 355 F. Supp. 2d 1269 (D. Utah 2005); *Post-Booker Federal Judicial Sentencing Practices*, testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, Mar. 16, 2006 (Washington, D.C.), available at *http://www.utd.uscourts.gov/judges/cassell_final.pdf*.

On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the sentence. Pet. App. 3. The Court of Appeals rejected the District Court's finding that the 55-year sentence was grossly disproportionate and, substituting its own findings for those of the District Court, which presided over the trial and sentencing proceedings, held that the District Court erroneously downplayed the seriousness of Mr. Angelos' crimes. *Id.* at 26.[5]

Amici submit that the District Court was right in finding the sentence "cruel, unjust and irrational" and support Petitioner's claim that the District Court and the Court of Appeals erred in refusing to hold that the sentence was unconstitutional in light of *Hutto v. Davis*. We agree with Petitioner's claim that the uncertain status of *Davis*, which we too contend is no longer good law, confuses this Court's otherwise clear guidance regarding the proper analysis of Eighth Amendment claims and that it caused the District Court below erroneously to conclude that it could not declare the sentence in this case to be unconstitutional.

We contend further that the District Court erred in leaving Mr. Angelos to the mercy of the executive or legislative branches and that the District Court and the Court of Appeals should have concluded that the application of § 924(c) in this case is unconstitutional under the Eighth Amendment because the resulting 55-year sentence is contrary to evolving standards of decency which are the hallmark of civilized society. As this Court recognized almost a century ago, the Eighth Amendment "may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." *Weems v. United States*, 217 U.S. 349, 378

5. As noted in Mr. Angelos' Petition, the Court of Appeals' substitution of its own findings for those of the District Court is contrary to established precedent. Pet. 3, n.2.

(1910). The 55-year sentence imposed upon Weldon Angelos provides this Court with the opportunity not only to clarify the questionable status of *Davis*, but to declare that the virtual life sentence imposed upon Petitioner in this case is contrary to our society's evolving standards of decency, fairness and justice and for that reason as well, is unconstitutional.

STATEMENT OF THE FACTS

Amici Curiae adopt the statement of facts set forth in the Petition.

ARGUMENT

MR. ANGELOS' 55-YEAR MANDATORY SENTENCE VIOLATES SOCIETY'S EVOLVING STANDARDS OF DECENCY.

From the enunciation of the Old Testament's principle of an "eye for an eye" and its interpretation that "a fair and equitable relation must exist between the crime and the punishment," *The Pentateuch and Haftorahs*, *Exodus* 21:24; nn. 23-24; Additional Notes at p. 405 (Dr. J.H. Hertz ed., 1979), to the time when Cicero declared "[l]et the punishment match the offense," Marcus Tullius Cicero, *De Legibus*, III, 20, society has demanded that there be a unique proportionality between punishment and the crime triggering the punishment. This Court's Eighth Amendment jurisprudence recognizes that "the right not to be subjected to excessive sanctions" flows from that basic precept of justice — that "punishment for crime should be graduated and proportioned to [the] offense," *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (internal quotations omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Weems*, 217 U.S. at 367), such that "extreme sentences that are 'grossly disproportionate' to the crime" are prohibited by the Eighth Amendment. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

The Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency' ... against which we must evaluate penal measures." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation omitted). Indeed, the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . [and] the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Recognizing that proportionality determinations are fluid over time, this Court long ago held that the Eighth Amendment "may be . . . progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378. Thus, in interpreting the Eighth Amendment's prohibition against cruel and unusual punishment, the Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (quoting *Trop*, 356 U.S. at 101).

Adhering to those clearly-defined standards, the District Court performed an extensive proportionality analysis applying the three factor test outlined in *Harmelin*, and correctly concluded that Mr. Angelos' sentence is "cruel, unjust, and irrational." Pet. App. 33, 102. The District Court made a threshold determination that Mr. Angelos' sentence was grossly disproportionate to the offenses he committed in light of, among other things, Mr. Angelos' status as a first-time offender with no prior adult criminal record, the lack of any use of force or threats of force or violence in connection with the offenses, and the lack of injury or threat of injury to any person or property. *Id.* at 90-91. The District Court also found that Mr. Angelos was punished more harshly than offenders in the same jurisdiction who had been convicted of far more serious crimes and that the sentence to be imposed was excessive. *Id.* at 91-92.

Further, the District Court found that Mr. Angelos' sentence exceeded comparable offenses in other jurisdictions. *Id.* at 63, 92. Despite its finding that the sentence was unconstitutional under the *Harmelin* test, the District Court felt bound by this Court's decision in *Hutto v. Davis* to uphold the sentence. Pet. App. 92-94.

Amici Curiae agree with Petitioner and respectfully suggest that once the *Harmelin* test has been satisfied, the analysis ends, and a finding that a sentence is unconstitutional under *Harmelin* is not inconsistent with *Davis*. Indeed, since this Court decided *Davis* twenty-four years ago, society's standards have changed, so much so that they not only cast doubt on the Court's pronouncement in *Davis*, but also show a significant movement in society's standards. Just as there has been a trend toward abolishing the death penalty for mentally retarded persons, *Atkins*, 536 U.S. at 313-17, and for juveniles under the age of eighteen at the time their crimes were committed, *Roper*, 543 U.S. at 564-68, because such executions constitute cruel and unusual punishment, there has been a similar trend through legislation toward the treatment of marijuana in comparison to other illegal drugs, like cocaine or heroin. *See, e.g.*, 21 U.S.C. § 841.[6]

6. The impact of Mr. Angelos' 55-year sentence on the victims of violent crimes is also reflective of society's evolving standards of decency. As the District Court held, the sentence here is not only unjust and disproportionate, it is "demeaning to victims of actual criminal violence." Pet. App. 97. Under the present statutory scheme, the victims of a terrorist who detonates bombs in public places, passengers on a hijacked plane, the family of a person killed by a second degree murderer, victims of a racist who attacks a minority member with the intent to kill, even a 10-year old rape victim, would see the perpertrators of these brutal crimes sentenced to far less prison time than Mr. Angelos. Pet. App. 66-68. The same standards of decency that have evolved over time to protect victims of violent crimes, as codified by, for example,

(Cont'd)

There has also been a movement seeking to pull back from mandatory minimum sentencing, with the American Bar Association Justice Kennedy Commission having recently issued a report, urging federal and state governments to repeal all mandatory minimum sentences. *See* American Bar Association Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates, dated Aug. 2004, at 26-28; *see also Justice Kennedy Feels His Oats*, Nat'l L.J., July 17, 2006, at 16, col. 3 (reporting on Justice Kennedy's remarks at the Ninth United States Circuit Court of Appeals judicial conference on July 10, 2006; an audio recording of Justice Kennedy's remarks is available in the Office of the Circuit Executive, United States Courts for the Ninth Circuit). The report echoes society's growing sentiment — and Amici's unique experience with federal prosecutions and sentencing issues — that mandatory minimum sentences are simply not the way to reduce crime. *See* Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 555-58 (2006) and authorities cited therein.[7]

(Cont'd)

the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Sta. 1248 (codified in scattered sections of 18 U.S.C.), the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.), the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (codified in scattered sections of 8 U.S.C.A., 18 U.S.C.A. and 42 U.S.C.A.), and the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, call for such victims to be protected from the demeaning impact on them of a 55-year sentence for a first time, non-violent marijuana offender like Mr. Angelos.

7. As Petitioner notes in his Petition, Justice Kennedy is not the only member of this Court to have questioned mandatory minimum sentences. Justice Breyer has criticized such sentences as did Chief Justice Rehnquist. Pet. 2, n.1.

The history of *Davis* itself, both before and after this Court's decision in 1982, exemplifies how society's evolving standards of decency breathe life into the Eighth Amendment. In 1979, the Virginia State Legislature recodified its criminal law, reducing the maximum penalty that could be imposed in connection with each of the offenses for which Davis was convicted from 40 years to 10 years because it considered Davis' sentence to be disproportionate. *See* Va. Code § 18.2-248.1(a)(2) (Supp. 1981); § 18.2-10(e) (1975); *Davis*, 454 U.S. at 386 (Brennan, J., dissenting) (although "[t]his legislative reappraisal of criminal punishment for marijuana offenses does not necessarily render unconstitutional [Davis'] substantially longer term . . . it plainly confirms the views of the courts below, which I share, that the punishment inflicted on Davis is unconstitutionally disproportionate and unsupported by any considered legislative judgment that the punishment inflicted is appropriate for the offenses committed"). Following this Court's decision in *Davis*, then-Virginia Governor Charles Robb granted a pardon to Davis, relieving him of any unserved portion of his 40 year sentence, which exceeded a total of 20 years. *See* List of Pardons, Commutations, Reprieves and Other Forms of Clemency, January 15, 1982 to January 17, 1983 Reported to The Governor and the General Assembly of Virginia. This is yet another example of the extent to which society's standards have changed — vis-à-vis *Davis* — since its pronouncement by this Court. In Mr. Angelos' case, however, the purpose of the cruel and unusual provision of the Eighth Amendment is to prohibit an unconstitutional sentence and not to leave a criminal defendant like Mr. Angelos to the mercy of the legislative or executive branches.

While the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," *Atkins*, 536 U.S. at 312 (citation omitted), "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976) (citations omitted). "[P]roportionality review by federal courts should be informed by 'objective factors to the maximum extent possible.'" *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)). Thus, another effective way of determining society's standards of decency and what comports with such standards is by learning from the individuals comprising that society, or the jurors from a particular case. The jury is a "significant and reliable objective index of contemporary values," *Gregg*, 428 U.S. at 181, and its behavior is a "highly relevant" indicator of a society's evolving standards. *See Coker v. Georgia*, 433 U.S. 584, 604 n.2 (1977) (Powell, J., concurring in part, dissenting in part). Jurors necessarily represent a fair cross section of a society's population, reflecting public attitude and responding to changed social conditions.

The District Court here acknowledged as much. Following Mr. Angelos' trial, the District Court contacted the jurors and, over the government's objection, sent each of them "the relevant information about Mr. Angelos' limited criminal history, described the abolition of parole in the federal system, and asked the jurors what they believed was the appropriate penalty for Mr. Angelos." Pet. App. 58. Of the twelve former jurors,

> Nine jurors responded and gave the following recommendations: (1) 5 years; (2) 5-7 years; (3) 10 years; (4) 10 years; (5) 15 years; (6) 15 years; (7)

> 15-20 years; (8) 32 years; and (9) 50 years. Averaging these answers, the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years.

Id. The District Court found that "[t]he more the court investigates . . . the more the court finds evidence that the § 924(c) counts here lead to unjust punishment." *Id.* The District Court's gathering of information from jurors is yet another method of promoting the evolution of the Eighth Amendment and further establishes that Mr. Angelos' 55-year mandatory term is not consistent with the standards of decency that mark the progress of a maturing society. *See* Eva S. Nilsen, *Indecent Standards: The Case of U.S. Versus Weldon Angelos*, 11 ROGER WILLIAMS U. L. REV. 537, 540-41 (2006) ("Judge Cassell's ambitious approach to the restrictions of mandatory sentences shows that judges can generate valuable data on evolving standards of decency and thereby give content to the Eighth Amendment").

In the final analysis, imposing a 55-year mandatory sentence on a first-time offender like Mr. Angelos does not comport with society's evolving standards, as reflected in jurors' views, the changes in the legal landscape over the last 25 years, the recommendations of judges and Justice Kennedy Commission members with respect to mandatory minimum sentencing or, at bottom, fundamental notions of justice and fairness. As such, Mr. Angelos' mandatory minimum sentence violates the Eighth Amendment's guarantee against cruel and unusual punishment that is informed by the evolving standards of decency in a civilized society. Amici Curiae respectfully maintain that, because a mandatory minimum punishment of 55-years in Mr. Angelos' case is incompatible with these standards, the punishment cannot withstand constitutional scrutiny.

CONCLUSION

Amici Curiae respectfully request the Court to grant Mr. Angelos' petition for a writ of certiorari.

Respectfully submitted,

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